UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HEATH MESHELL & THOMAS REDD,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION NO. H-05-1690
	§	
NOBLE DRILLING SERVICES, INC. &	§	
NOBLE DRILLING (U.S.) INC.,	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION

This case presents consolidated claims under Title VII for same sex harassment and constructive discharge, as well as common law assault and battery.[1] Discovery is complete, and defendants have moved for summary judgment (Dkt. 71),[2] which was briefed and argued at a hearing on January 3, 2007. Upon consideration of the summary judgment record, arguments of counsel, and applicable legal authorities, it is recommended that defendants' motion for summary judgment be GRANTED.

BACKGROUND

Plaintiffs Thomas Redd and Heath Meshell allege that defendants Noble Drilling Services, Inc., and Noble Drilling (U.S.) Inc. (collectively, "Noble") violated Title VII of

[1] The court ordered consolidation of plaintiffs' cases on July 5, 2005, and simultaneously dismissed their claims for intentional infliction of emotional distress. (Dkt. 15).

[2] Defendants' motion for summary judgment (Dkt. 57) was initially docketed without the appropriate attachments. The motion is properly docketed as Dkt. 71.

the Civil Rights Act of 1964 by subjecting them to a sexually hostile work environment and constructively discharging them for their harassment complaint. Plaintiffs also assert assault and battery claims against Noble. The following facts are uncontroverted.[3]

Noble hired roustabouts Meshell and Redd on April 22, 2002 and August 12, 2002, and assigned them to the semi-submersible drilling unit, *Noble Homer Ferrington ("NHF")*. At the relevant times, all Noble personnel on the *NHF* were male. On November 20, 2003 crane operator Allen Dion McLain was transferred from the *Noble Max Smith* to the *NHF*. As a crane operator, McLain led a team of roustabouts directing their daily tasks and ensuring that the work was performed safely.[4]

On December 16, 2003, Redd and Meshell complained to the assistant rig manager, Stanley Gallow, that McLain had made lewd and sexually explicit comments, touched then in offensive ways, and solicited sexual activity from them repeatedly on a daily basis since his arrival. They shared a tally book of entries Redd had compiled, listing the dates of

---

[3] Defendants object to plaintiff's tender of the entire U.S. Equal Employment Opportunity Commission investigative files concerning Redd and Meshell's charges of discrimination. Because the files contain both settlement information and hearsay inadmissible under Federal Rules of Evidence 408, 801, and 802, this objection is sustained. *Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123, 126-27 (5th Cir.), *cert. denied*, 488 U.S. 925 (1988). Defendants' objection to the admission of the EEOC's partial cause determination pertaining to sexual harassment is also sustained. EEOC determinations may be admissible if they fall within the hearsay exception of Rule 803(8)(C). *Smith v. Universal Services, Inc.,* 454 F.2d 154 (5th Cir. 1972). That exception does not apply if "the sources of information or other circumstances indicate lack of trustworthiness." *McClure v. Mexia Ind. School Dist.,* 750 F.2d 396, 399-400 (5th Cir. 1985). For reasons discussed *infra* at 20*,* the EEOC's conclusion regarding the futility of reporting harassment to the employer is not supported by trustworthy evidence, and therefore should be excluded.

[4] Knight Declaration. ¶ 4, 5, 6

McLain's alleged actions and statements.

The incidents occurred repeatedly from November 20, 2003 until December 16, 2003,[5] and included the following statements by Mclain:[6]

(a) "I ain't not faggot but I sure do like to such a good dick every once in awhile," while reaching for Meshell's zipper.

(b) telling Redd, "You sure are a pretty motherfucker. Can I suck your dick?"

(c) blowing kisses at Meshell and Redd several times a day in the presence of other employees;

(d) rubbing himself while saying, "It feels good. It feels good. Do you wanna feel?"

(e) grabbing Meshell's shoulder and saying, "Man, I got to piss. Which one of ya'll wants to hold my peter? Come on, man. It's not anything but hair and head;"

(f) grabbing Meshell's leg saying "I thought we were getting close after last night;"

(g) repeatedly asking Meshell to hold [Mclain's] penis in front of other employees saying, " Come on, man. Just put it in your hand for a minute;"

(h) demanding Meshell to come to his room, telling him "it won't take too long and it won't hurt;"

(i) asking Meshell if "he could rub on [Meshell's] ass for awhile;"

(j) while trying to put his arm around Redd, stating that he wanted to talk to Redd

---

[5] Redd Dep. Vol I, at 122-25, 140, 144-46, 190-98; Meshell Dep. at 137-41.

[6]See Redd Complaint. ¶ 18; Meshell Compl. ¶ 18; Redd Deposition. vol I, at 20-21, 146-66 & exhibits 1, 6; Meshell Dep. At 101-16 & ex. 4.

about "this blow job I'm trying to giving him;"

(k) telling Redd and Meshell to close their eyes and pretend that it's Brittany Spears;

(l) telling Redd, "I can tell by the look in your eye that you want to fuck me;"

(m) attempting to grab Redd's buttocks;

(n) asking Redd and Meshell, "[w]hat the fuck is wrong with ya'll? Ya'll look like ya'll got the taste of dick in your mouth. What's wrong, I thought you guys liked the taste of dick;"

(o) pinching Meshell's cheeks and saying, "I'd sure like to fuck you;"

(p) approaching Meshell in the lower sack room saying, "I am starting to miss you. You don't get lonely down here? Let me keep you company. Put your dick in my hand and let me feel your ass. Well, just rub on my ass a little bit."

Redd and Meshell's complaint on December 16, 2003 was the first time Noble had received information about McLain's sexual misconduct.[7] Upon receiving Redd and Meshell's complaints, Gallow woke Perry Hammond, assistant rig manager. Redd and Meshell repeated their concerns to Hammond who then alerted Vernon Sonnier, rig manager/offshore installation manager. Subsequently, rig management directed Redd and Meshell to prepare written statements. Noble also obtained a written statement from Clifford Jones, who was identified as a witness by Redd and Meshell.[8]

---

[7] Knight Decl. ¶ 7. Plaintiffs contend that McLain had unspecified personal conflicts on previous assignments, but nothing in the record suggests any prior sexual misconduct by McLain.

[8] Redd Dep. vol. I, at 190-91, 196-99; Meshell Dep. at 100-01, 140-41.

Noble immediately removed McLain from the rig.[9] Until McLain departed the rig, Noble had Redd and Meshell remain in the office. Redd requested to be flown home from the rig immediately, but this request was denied. Redd complained to Sonnier about stress-related stomach pains and again requested to go home. Sonnier then accompanied Redd on the helicopter and drove him to the emergency room at the Lady of the Sea General Hospital in Louisiana. After an examination, the hospital released Redd to resume full work duty as tolerated. Meshell left the rig on the next helicopter, picked up Redd at the hospital, and drove to Lafayette, Louisiana where Noble had scheduled a meeting with Therald Martin, drilling superintendent. At the meeting, Redd and Meshell discussed the tally book entries.[10]

The same day, Martin, division manager Jimmy Pucket, and personnel manager Joe Knight met with McLain to discuss Redd and Meshell's complaints. McLain denied making the statements listed in Redd's tally book and charged that his words had been changed. McLain did not articulate what he actually said.[11]

On December 19, 2003 after a discussion with Puckett and Tom Madden, director of administration, Knight terminated McLain. Knight then advised Redd and Meshell of McLain's termination and invited them to return to work. Redd and Meshell were also given the option to transfer to another rig if they desired, with no change in salary, benefits, or

---

[9] Knight Decl. ¶ 7

[10] Redd Dep. vol. I, at 214-18; Meshell Dep. at 147, 149; Knight Decl. ¶ 9, 10.

[11] Knight Decl. ¶ 11

duties, but neither committed to returning to work.[12] Knight asked them to notify him before January 7, 2004, the beginning of their next scheduled hitch, whether they planned to report for work.[13]

Neither Redd nor Meshell returned to work at Noble after December 16, 2003, nor did either see McLain after that date. On January 5, 2004, Redd informed Knight that he would not return to the rig on January 7, 2004 because of a doctor's appointment for continuing treatment of a medical condition.[14] Because Redd and Meshell had submitted medical excuses from their health care providers, Noble sent separate letters to Redd and Meshell, conditionally designating their absences since January 7, 2004 as leave covered by the Family and Medical Leave Act ("FMLA"). The letters explained rights and obligations under the FMLA and advised Redd and Meshell to submit a completed Certificate of Health Care Provider form by February 20, 2004. Noble's forms specifically outlined the possible consequences if adequate medical certification was not provided by the deadline.[15]

Redd and Meshell failed to submit the required certification by February 20, 2004. Noble then sent their attorney a letter on February 26, 2004 reminding her of the medical

---

[12] Redd Dep. vol. I, at 219-23, 199; Meshell Dep. at 155-56; 158 Knight Decl. ¶ 11, 12, 15.

[13] Knight Decl. ¶ 14.

[14] Redd Dep. vol. I, at 219-23, 199; Meshell Dep. at 155-56; Knight Decl. ¶ 15.

[15] Redd Dep. vol. I, at 242-48, exs. 13-14; Meshell Dep. at 161-66 & ex. 10; Knight Decl. ¶ 17, & exs. 5-7.

certification requirement and consequences for failing to submit one. Noble agreed to extend the deadline for providing the certification until March 8, 2004, and reiterated that if Noble did not receive the medical certifications by then, it would withdraw the conditional designation, treat the absence as unexcused, and impose disciplinary action, including termination.[16]

Unknown to Noble, Redd had begun working for TransOcean Offshore, Inc. around February 17, 2004. On March 5, 2004 Redd's attorney notified Noble's counsel that Redd had resigned.[17] Meshell did not submit the FMLA medical certification. On March 5, 2004, Meshell's attorney informed Noble that she had not been able to contact Meshell and would let Noble once she knew his decision. Later that day, Noble again reminded Meshell's attorney that Noble of the consequences of not submitting the adequate medical certification. On March 8, 2004, Noble terminated Meshell for failing to submit the FMLA medical certification.[18]

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden to prove there are no genuine issues of

---

[16] Redd Dep. vol. I, at 260-62 & ex. 17; Meshell Dep. at 172-74; Knight Decl. ¶ 18.

[17] Redd Dep. vol. I, at 262-64 & ex. 18.

[18] Meshell Dep. at 172-77 & ex. 14, 16; Knight Decl. ¶ 20 & ex. 8.

material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Dispute about a material fact is "genuine" if the evidence could lead a reasonable jury to find for the nonmoving party. *In re Segerstrom*, 247 F.3d 218, 223 (5th Cir. 2001). "An issue is material if its resolution could affect the outcome of the action." *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002). The movant need not introduce evidence to negate the opponent's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the movant meets this burden, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (quoting *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995)); *Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). If the evidence presented to rebut the summary judgment is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In determining whether a genuine issue of material fact exists, the court views the evidence and draws inferences in the light most favorable to the nonmoving party. *Id.* at 255; *Hotard v. State Farm Fire & Cas. Co.*, 286 F.3d 814, 817 (5th Cir. 2002).

ANALYSIS

1. Hostile Work Environment Claim

Sexual harassment in the workplace is a form of sex discrimination proscribed by Title VII. *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67 (1986). Sexual harassment need not

involve members of the opposite sex; same-sex harassment is actionable under Title VII if the harassment occurs "because of" the plaintiff's sex. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). The elements of a Title VII harassment claim vary depending upon whether the alleged harasser is a co-employee or a supervisor with immediate or successively higher authority over the plaintiff. *Watts v. Kroger Co.,* 170 F.3d 505, 509 (5th Cir. 1999). To establish a claim of co-worker sexual harassment, a plaintiff must show: (1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based upon sex; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) his employer knew or should have known of the harassment and failed to take prompt remedial action. *Harvill v. Westward Commc'n, L.L.C.*, 433 F.3d 428, 434 (5th Cir. 2005).

When the harassment in question was allegedly committed by a supervisor with immediate or successively higher authority over the plaintiff, the fifth element need not be established. In such cases an affirmative defense is available to the employer, provided that the supervisor's harassment did not result in a "tangible employment action" against the employee. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). The affirmative defense has two elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm

otherwise. *Id.*

The parties dispute whether McLain, the alleged harasser, was a supervisor. The touchstone of supervisory status is the extent of the authority possessed by the purported supervisor over the employees in question. *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1033 (7th Cir. 1998). Noble argues that McLain did not have the authority to hire or fire Noble employees. Meshell, however, testified that McLain directed the work performed each day and he believed McLain had the authority to fire or transfer him off the crew.[19] Similarly, Redd testified that he believed McLain was his direct supervisor and that McLain could have an employee fired, transferred, or affect compensation.[20] The record shows that as crane operator, McLain led a team of roustabouts, including Redd and Meshell and that he directed the roustabouts' daily tasks and ensured that all work was performed safely.[21] Finally, Noble's job description of a roustabout specifically states that a roustabout works under the direction of the crane operator.[22] Thus, at the very least there is a fact issue regarding McLain's status as a supervisor with successively higher authority over Redd and Meshell. Defendants' motion accordingly will be considered under the legal standards applicable to sexual harassment by a supervisor.

---

[19] Meshell Dep. at76 - 77.

[20] Redd Dep. at 93, 100-01.

[21] Knight Declaration ¶ 6

[22] Dkt. 71, Exhibit 5, Appendix to Defendant's Motion for Summary Judgment at 166.

Noble asserts that plaintiffs' sexual harassment claim fails for essentially two[23] reasons: (1) the harassment inflicted by McLain did not constitute sex-based discrimination; (2) its *Faragher/Ellerth* affirmative defense has been established as a matter of law. Each contention will be considered in turn.

a. Harassment "because of sex"

The Fifth Circuit has emphasized that in cases of alleged same-sex harassment, the initial inquiry should focus on the third element of the claim, i.e. whether the harassment constituted "discrimination . . . because of . . . sex." *La Day v. Catalyst Technology, Inc.,* 302 F.3d 474, 478 (5th Cir. 2002). This emphasis reflects Justice Scalia's admonition in *Oncale* that workplace harassment is not "automatically discrimination merely because the words used have sexual content or connotations." *Oncale,* 523 U.S. at 80. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* (quoting *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 25 (Ginsburg, J., concurring)).

The *Oncale* opinion outlined three ways in which a court might infer discrimination from an incident of same-sex harassment: (1) explicit or implicit proposals of sexual activity,

---

[23] Noble also argues that its prompt remedial action defeats plaintiffs' claim, but this argument would be viable only against a claim of harassment by a non-supervisor, which has been ruled out for purposes of this motion. Nevertheless, prompt remedial action is relevant to the *Faragher/Ellerth* affirmative defense, as discussed below. *See Woods v. Delta Beverage Group,* 274 F.3d 295, 300 n.3 (5th Cir. 2001).

together with "credible evidence that the harasser was homosexual;" (2) evidence that the harasser was motivated by general hostility to the presence of [members of the same sex] in the workplace; or (3) direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. *Oncale,* 523 U.S. at 80; *La Day,* 302 F.3d at 478. Here, as in *La Day,* the plaintiffs invoke only the first type of proof.

Noble contends that McLain's alleged conduct, while admittedly "vulgar and unacceptable," was not sex-based discrimination because (a) it was intended to intimidate rather than to gratify a sexual desire, and (b) there was no evidence of homosexuality on the part of McLain, who was married.[24] This argument is unpersuasive for a number of reasons. First, the summary judgment record is replete with numerous examples of sexual advances by McLain towards the plaintiffs. Admittedly, it is theoretically possible to infer that in each instance McLain was attempting merely to humiliate and embarrass rather than to engage in sexual activity. But on summary judgment all reasonable inferences must be drawn in favor of the plaintiffs. Here it is certainly reasonable to infer that the sexual advances were neither feigned nor done in jest.

As for credible evidence of McLain's homosexual orientation, Noble argues that evidence of homosexuality must be based on something other than the conduct complained of, citing two decisions outside of this circuit. *Davis v. Coastal Int'l Sec., Inc.,* 275 F.3d 1119, 1123 (D.C. Cir. 2002); *English v. Pohanka of Chantilly, Inc.,* 190 F.Supp.2d 833, 846

[24] Noble also cites the often crude and vulgar atmosphere which is undoubtedly typical of offshore drilling units. But *Oncale* itself involved the very same type of workplace.

(E.D.Va. 2002). But the Fifth Circuit plainly does not adhere to this rule. In *La Day* the court directly addressed what kind of proof would satisfy *Oncale's* condition of credible evidence that the harasser was homosexual:

> It is not possible for us to specify all the possible ways in which a plaintiff might prove that an alleged harasser acted out of homosexual interest in him. Nonetheless, there are two types of evidence that are likely to be especially "credible" proof that the harasser may be a homosexual.
>
> The first is evidence suggesting that the harasser intended to have some kind of sexual contact with the plaintiff rather than merely to humiliate him for reasons unrelated to sexual interest. The second is proof that the alleged harasser made same-sex sexual advances to others, especially to other employees. A harasser may well make sexually demeaning remarks and putdowns to the plaintiff for sex-neutral reasons, as in *Rene*, but he is far less likely to make sexual advances without regard to sex.

La Day, 302 F.3d at 480. The *La Day* court then proceeded to deny summary judgment based on evidence that the alleged harasser had made sexual advances towards both the plaintiff and other male employees.

The evidence here is certainly sufficient to create a fact issue regarding McLain's sexual orientation.[25] The fact that he was married argues against homosexuality, but is hardly conclusive.[26] Viewing the evidence most favorably to the plaintiffs, McLain made sexual advances, both by words and physical contact, to more than one male employee aboard the *NHF*. Under *La Day,* this evidence is sufficient to avoid summary judgment on the ground

---

[25] It is unfortunate that this type of Title VII case makes a non-party's sexual orientation the subject of adjudication, but *Oncale* leaves no other alternative.

[26] *See* Neil McKenna, *The Secret Life of Oscar Wilde* (2003).

that the conduct in question was not discrimination based on sex.[27]

b. Faragher/Ellerth Affirmative Defense

An employer may avoid vicarious liability for a supervisor's conduct by means of the *Faragher/Ellerth* affirmative defense. *Faragher* 524 U.S. at 807; *Ellerth* 524 U.S. at 765. This defense is available only for harassment claims of the hostile work environment variety; it is not available where the employer took some tangible employment action against the plaintiffs. *Id.* To establish this defense, the employer must prove by a preponderance of evidence that (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior *and* (b) the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.*

Plaintiffs' sexual harassment claim does not involve any tangible employment action on the part of Noble. Although plaintiffs assert that the alleged harassment culminated in their constructive discharge, an employer is entitled to rely upon the *Farragher/Ellerth* defense in such cases unless "the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation." *Pennsylvania State Police v. Suders,* 542 U.S. 129, 134 (2004). In this case the intolerable

---

[27] Noble cites the unpublished decision in *Kreamer v. Henry's Towing,* 150 Fed.Appx. 378, 382-83 (5th Cir. 2005) for the proposition that sexual advances accompanied by physical groping were "bullying rather than sexual in nature." But even if *Kreamer* were binding precedent (which it is not under 5th Cir. R. 47.5.4), the *Kreamer* opinion expressly declined to address whether the offending conduct constituted harassment based on sex. 150 Fed.Appx at 382 n.2.

working conditions giving rise to constructive discharge were acts of sexual harassment unconnected to any official employment action. Because plaintiffs here have charged no official act underlying their constructive discharge,[28] Noble is entitled to invoke the *Faragher/Ellerth* affirmative defense.

(1) Reasonable care

Redd and Meshell argue that Noble did not take reasonable care in preventing the harassment, the first prong of the *Faragher/Ellerth* affirmative defense. They assert that Noble's harassment policy was not well-worded or well-publicized and that the complaint procedures were not known or understood by employees. They also charge that Noble did not send out periodic mailings or publish articles in the company newsletter about the policy.

The summary judgment evidence shows that Noble maintained a Harassment Policy as part of its Administrative Policy Manual,[29] and both Redd and Meshell testified that they were aware of this policy, which was posted and available to all employees.[30] In fact, Noble's harassment policy declares:

> Harassment on the basis of race, sex, religion, national origin, age, or disability will not be permitted or condoned. Racial, sexual, age or disability-related, or ethnic slurs and insults are wholly inappropriate and violate the Company's Equal Opportunity policy, and may also

---

[28] Other reasons for rejecting plaintiffs' constructive discharge claims are discussed *infra* at 22.

[29] *See* Administrative Policy Manual, Defendants' Motion for Summary Judgment, App. 354-55, Ex. 1.

[30] Meshell Dep. at 64; Redd Dep. at 44, 50.

> violate state and federal law.[31]

As for the complaint procedure, the policy unequivocally states:

> Complaints should be reported immediately. Any employee who feels that he or she is the victim of a violation of this policy is urged to contact his or her supervisor, the NDSI Administration Department, or any officer of the Company as appropriate, through the Open Door policy."[32]

On its face, Noble's policy forbids harassment based on sex, and provides an appropriate procedure for reporting violations. Furthermore, it is not contested that Noble posted its harassment policy in the common areas of the *NHF,* and that the harassment policy was contained in the policy manual which was available for inspection in the rig manager's office. Finally, Redd and Meshell plainly understood Noble's harassment policy because they followed its reporting procedure when they complained to rig manager Stanley Gallow on December 16, 2003. Therefore, after careful review of the record, the court finds that Noble implemented appropriate mechanisms to prevent and correct sexual harassment, thereby satisfying the first prong of the *Faragher/Ellerth* affirmative defense.

(2) Failure to avoid harm

Noble has also established that Redd and Meshell were unreasonable in avoiding harm, the second prong of the *Faragher/Ellerth* affirmative defense. This element of the defense is "imported from the general theory of damages, that a victim has a duty 'to use

---

[31] Defendants' Motion for Summary Judgment, App. 354-55, Ex. 1.

[32] *Id.* (emphasis in original)

such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." *Faragher*, 524 U.S. at 806 (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n. 15 (1982)). Redd and Meshell allege that they were harassed by McLain almost daily since November 20, 2003, but they did not complain until December 16, 2003 nearly a month later. This delay was contrary to Noble's complaint procedure, which encouraged employees to immediately report harassing behavior. Redd and Meshell worked aboard the *NHF* twenty four hours a day for two weeks at a time, and a rig manager was at all times on board and available to receive their complaint. Despite keeping detailed tally book entries of daily harassment described as "the worst thing that's ever happened in [their] life," Redd and Meshell waited for nearly a month before bringing their complaints to Noble's attention.

Ordinarily, the delay of a month or so in reporting sexual harassment would at most create a genuine issue of material fact regarding this prong of the *Faragher/Ellerth* defense. *See Watts v. Kroger Co.,* 170 F.3d 505, 510 (5th Cir. 1999) ("A jury could find that waiting until July of that same year before complaining [of harassment which intensified in the spring] is not unreasonable").[33] But two factors not present in *Watts* dictate a different result here. First, unlike the plaintiff in *Watts*, Redd and Meshell were actually living in their

[33] Noble cites *Williams v. Administrative Review Board,* 376 F.3d 471 (5th Cir. 2004) for the proposition that a one month delay in complaining about a hostile work environment warranted a *Faragher/Ellerth* defense. But *Williams* was not a summary judgment case, and arose in the very different context of a substantial evidence review of an administrative decision rejecting a whistle-blower claim.

workplace, at least for the duration of their two week duty. A grocery store clerk subjected to harassment on an 8 hour shift would at least be able to find relief after she punches out each day. But off-shore rig workers such as Redd and Meshell had no similar prospect of an automatic daily "break" from abuse, and were ostensibly vulnerable 24 hours a day. Under these circumstances, it is not unreasonable to expect a shorter time interval for complaints.

Second, and more importantly, neither Redd nor Meshell ever returned to their job after submitting their complaints, and thereby deprived Noble's harassment policy of a chance to work. A primary objective of Title VII is "to encourage the creation of antiharassment policies and effective grievance mechanisms." *Ellerth,* 524 U.S. at 764. The *Faragher/Ellerth* defense was designed to serve not only this deterrent purpose of Title VII, but also the "equally obvious policy imported from the general theory of damages, that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." *Faragher,* 524 U.S. at 806, *quoting Ford Motor Co. v. EEOC,* 458 U.S. 219, 231 n. 15 (1982). It is clear that an employee's duty of reasonable care to avoid harm encompasses not only the duty to initiate the employer's grievance process, but also to allow that process a chance to work:

> If the plaintiff unreasonably failed to avail herself of the employer's preventive *or remedial* apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, *and if damages could reasonable have been mitigated* no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.

Faragher, 524 U.S. at 806-07 (emphasis added).

This principle is clearly demonstrated by the Fifth Circuit's decision in *Woods v. Delta Beverage Group, Inc.,* 274 F.3d 295 (5th Cir. 2001). After Woods initially reported a co-worker's harassing conduct, Delta Beverage admonished the harasser to stop and instructed Woods to report any further harassment. Even though the harassing conduct continued, Woods failed to report it. The Fifth Circuit held that her failure to follow up was "fatal" to her case. 274 F.3d at 300. Even though this was not a supervisor liability case, the court found "instructive" the *Faragher/Ellerth* duty to take advantage of the remedial process offered by the employer:

> As mentioned previously, this is not a supervisor liability case. However, the second prong of the affirmative defense is instructive to our "co-worker" liability case. *To avoid further harm after July 7, Woods needed to take advantage of the corrective opportunities provided by her employer.* Woods cannot expect Delta Beverage to solve her problem when it had no knowledge that she continued to suffer harassment.

274 F.3d at 300 n.3 (emphasis added).

Like the plaintiff in *Woods,* Meshell and Redd did not take advantage of their employer's corrective action. Noble removed McLain from the rig within a few hours after their complaint, and terminated him three days later. Noble advised both Meshell and Redd of this action, and unconditionally invited them to return to work. They were even given the option of transferring to another rig, with no change in salary, benefits, or duties. Meshell and Redd declined these offers, and never returned to work for Noble. Under these circumstances, Meshell and Redd unreasonably denied Noble's grievance mechanism a

chance to work. *See Casiano v. AT&T Corp.,* 213 F.3d 278, 286-87 (5th Cir. 2000) (*Faragher/Ellerth* defense established where employee notified his employer of alleged sexual misconduct only after he had ceased working); *Thompson v. Naphcare, Inc.,* 117 Fed. Appx. 317 (5th Cir. 2004) (plaintiff acted unreasonably by resigning almost immediately after employer's prompt investigation and remedial actions).

(3) Alleged fear of reprisals and futility

Redd and Meshell offer two excuses for their failure to take advantage of Noble's anti-harassment policy: fear of retaliation and futility. Neither of these justifications is supported by the record.

It is well established that mere subjective fears of reprisal are insufficient to excuse an employee's failure to take advantage of company policy on reporting sexual harassment. *Hockman v. Westward Communications, LLC,* 407 F.3d 317, 329-30 (5th Cir. 2004); *Harper v. City of Jackson Municipal School Dist.,* 149 Fed. Appx. 295, 301-02 (5th Cir. 2005); *Young v. R.R. Morrison and Son, Inc.,* 159 F. Supp.2d 921, 927 (N.D. Miss. 2000). Meshell and Redd have offered no objective evidence that any Noble employee reporting sexual harassment was ever subjected to retaliation.

Similarly, the Fifth Circuit requires objective evidence that reporting harassment would be futile because the employer had no real intention of stopping it. *See Woods v. Delta Beverage Group, Inc.,* 274 F.3d 295, 300-01 (5th Cir. 2001) ("[O]nce it becomes objectively obvious that the employer has no real intention of stopping the harassment, the

harassed employee is not obliged to go through the wasted motion of reporting the harassment"). Here, plaintiffs allude to two prior incidents of alleged harassment involving other individuals which Noble failed to address. Redd recounted an incident which he did not witness but was described to him by a fellow employee named Chris Boney. Boney apparently[34] told Redd that another company's employee had rubbed his bare penis against Boney, and that Noble had sent Boney home because he responded to the encounter by picking up a pipe wrench.[35] Even if Redd's account of this alleged encounter were not inadmissible hearsay, which it is, Redd does not state whether Boney filed an internal complaint pursuant to the sexual harassment policy, nor whether Noble failed to take appropriate corrective action in that event. Meshell recounted another incident of sexual misconduct he witnessed, but like Redd he does not know whether the harassing conduct was even reported, much less whether Noble failed to take appropriate corrective action.[36] Finally, Redd points to the failure of Noble's rig manager to follow up on Redd's request "to talk about my new supervisor" the first day McLain appeared on the *NHF*. But this general request was hardly sufficient to put Noble on notice of alleged sexual harassment. *See Woods,* 274 F.3d at 299 (explaining that an employer cannot be held liable for "conduct of which it had no knowledge").

---

[34] The record contains no deposition testimony or affidavit by Boney, nor is there any documentary evidence of the alleged encounter.

[35] *See* Redd Dep. vol I, at 71-73.

[36] *See* Meshell Dep. at 204.

In sum, there is simply no competent objective evidence supporting plaintiffs' claim that it would have been futile to complain about McLain's harassing conduct. To the contrary, Noble's prompt remedial action in immediately removing McLain from the rig and terminating him three days later powerfully rebuts any claim that Noble regarded its sexual harassment policy as mere window-dressing. Because no reasonable jury could find that the plaintiffs had satisfied their corresponding obligations of reasonable care to avoid or mitigate harm, Noble has established the second prong of its *Faragher/Ellerth* defense as a matter of law.

The terms "severe" and "pervasive" may indeed be too mild to describe the harassment endured by Meshell and Redd during the four weeks McLain was assigned to the *NHF*; "outrageous" would seem more apt. Nevertheless, the Supreme Court has instructed that Title VII does not impose strict vicarious liability upon an employer for all occurrences of sexual harassment in the workplace. Here, Noble has established the *Faragher/Ellerth* affirmative defense as a matter of law because (a) it exercised reasonable care to prevent and correct sexually harassing behavior, and (b) Redd and Meshell unreasonably failed to avoid harm by waiting a month to complain and then leaving the job before Noble could remedy the situation. Summary judgment should therefore be granted dismissing the Title VII hostile working environment claim.

2. Constructive Discharge Claim/Retaliation Claim

Constructive discharge is not a stand-alone cause of action. Like any adverse

employment action, a constructive discharge becomes actionable only when it is tied to a statutorily-proscribed factor, such as race, sex, age, or retaliation for protected activity. Plaintiffs' complaints in this case, generously construed, assert two different constructive discharge claims: (1) that they were constructively discharged as a result of the hostile work environment generated by sexual harassment, and (2) that they were constructively discharged in retaliation for complaining about the harassment. The former claim–i.e. hostile work environment culminating in constructive discharge– has already been disposed of by the conclusion that Noble has established its *Faragher/Ellerth* affirmative defense as a matter of law. *See Pennsylvania State Police v. Suders,* 542 U.S. 129, 147-48 (2004). This section accordingly addresses the latter claim of retaliatory constructive discharge.

Actionable retaliation under Title VII consists of (1) protected activity, (2) an adverse employment action, and (3) a causal nexus between the two. *Harvill Westward Communications, L.L.C.*, 433 F.3d 428, 439 (5th Cir. 2005). To prove constructive discharge, an employee must offer evidence that the employer made conditions so intolerable that a reasonable employee in his shoes would feel compelled to resign. *Landgraf v. USI Film Products,* 968 F.2d 427, 429-30 (5th Cir. 1992). Unlawful discrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge. *Boze v. Branstetter*, 912 F.2d 801, 805 (5th Cir. 1990).

The only protected activity cited by either plaintiff is the harassment complaint they made to Gallow on December 16, 2003. Neither Redd nor Meshell have offered any

evidence that they resigned because of intolerable working conditions attributable to this complaint. In fact, neither plaintiff experienced working conditions of any sort at Noble after that date, because they never returned to their jobs. The working conditions endured by Redd and Meshell prior to their protected activity, while perhaps deplorable, are nonetheless immaterial to a claim of retaliation.

Noble's response to the harassment complaint was entirely appropriate and responsible–a prompt and thorough investigation, immediate removal of the harasser from the workplace, decisive disciplinary action, and an unqualified invitation to the plaintiffs to resume their jobs. No hint of retaliatory motive is present here. Nor is there any causal link between Redd's resignation to take a better-paying job elsewhere and his harassment complaint. As for Meshell, the record is clear that he did not actually resign from Noble, but was discharged for failing to submit Family Medical Leave Act certification.[37] Under these circumstances, plaintiffs have failed to establish a genuine issue of material fact, and Noble is entitled to summary judgment on the constructive discharge claims.

3. Assault and Battery Claims

Plaintiffs' assault and battery claims rely on the same conduct underlying their hostile-work environment claim. Under Texas law, an employer may be liable for an employee's tortious conduct only if that conduct falls within the scope of the employee's general authority and in furtherance of the employer's business. *Buck v. Blum*, 130 S.W.3d 285, 288-

[37] Meshell Dep. at 176-77.

89 (Tex. App. - Houston [14th Dist.] 2004, no pet.). Intentional torts, including assault and battery, against another employee are not ordinarily within the scope of an employee's authority. *Texas & P. Ry. Co. v. Hagenloh,* 247 S.W.2d 236, 239, 241 (Tex. 1952) ("It is not ordinarily within the scope of a servant's authority to commit an assault on a third person. . . Usually assault is the expression of personal animosity and is not for the purpose of carrying out the master's business."). Here, nothing in the record connects McLain's harassing conduct to his job duties as a crane operator. McLain's conduct was clearly outside the scope of his authority. Nor is there any record evidence that Noble condoned or ratified McLain's conduct; to the contrary, he was terminated for it. Therefore, Noble should be granted summary judgment on these claims as well.

CONCLUSION AND RECOMMENDATION

For these reasons, it is recommended that Nobles's motion for summary judgment be granted in its entirety. The parties have ten (10) days from receipt of this Memorandum and Recommendation to file written objections. *See* FED. R.CIV.P. 72. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error.

Signed at Houston, Texas on March 16, 2007.

Stephen Wm Smith
United States Magistrate Judge